Nos. 97-400
97-430

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Supreme Court of the United States

October Term, 1997

ESSEX COUNTY UTILITIES AUTHORITY, HUDSON COUNTY IMPROVEMENT AUTHORITY, MERCER COUNTY IMPROVEMENT AUTHORITY, PASSAIC COUNTY UTILITIES AUTHORITY, et al.,

Petitioners,

v.

ATLANTIC COAST DEMOLITION & RECYCLING, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

POINT I

THIS CASE RAISES AND TURNS ON AN IMPORTANT CONTRADICTION IN THE COURT'S COMMERCE CLAUSE JURISPRUDENCE, AND WARRANTS REVIEW BY THE COURT.

Respondents Atlantic Coast Demolition & Recycling, Inc. ("Atlantic Coast") and C & A Carbone, Inc. ("Carbone") unitedly deny that the decision below reveals a conflict between the Court's decisions in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and *General Motors Corp. v. Tracy*, 117 S.Ct. 811 (1997). The disparate results in those cases, respondents assert, are attributable to a simple "factual" distinction (Atlantic Coast Brief at 14; Carbone Brief at 8).

The "factual" distinction to which respondents refer is precisely this: the solid waste ordinance at issue in *Carbone* was found to be discriminatory under the dormant Commerce Clause, while the utility tax exemption at issue in *Tracy* was found not to be discriminatory. As is clear on a moment's thought, this is not a "factual" distinction at all; rather, it is a mere description of the different legal outcomes of the two cases.

The Court's opinion in *Tracy* leaves no doubt that the pivotal factor in that case was that it involved a State's exercise of its utility regulation powers – as does this case. The Third Circuit, speaking without the benefit of the Court's decision in *Tracy*, mistakenly concluded that the Commerce Clause principles set forth in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951), were defunct, and therefore failed to

give any weight or consideration to the utility underpinnings of New Jersey's solid waste program. In so doing, the lower court misapplied this Court's precedents, which have consistently recognized the need to balance and preserve traditional State sovereignty over utilities against countervailing considerations of interstate commerce.

From any constitutional perspective, the weight attaching to, and the deference owed, a state-controlled solid waste utility system clearly exceed the weight attaching to, and deference owed, a solitary municipal wasteflow ordinance. Preemption of an entire relevant market by State certification of regulated utilities providing essential bundled services to all state residents is not the same thing, or close to the same thing, as a municipal ordinance establishing and protecting a local monopoly over services generally provided through the open market.

If, as the Third Circuit held, *Carbone* treats those two very different things as constitutional equals, then the decision is unsound, and should be reconsidered in light of *Tracy*. If, on the other hand, the Third Circuit was wrong in holding that *Carbone* controls in a case involving a State utility system bearing marked similarities to those upheld in *Panhandle* and *Tracy*, then, as Petitioners have previously stated, the citizens of New Jersey have been dealt a judicial error of mammoth proportions.

The tension between *Tracy* and *Carbone* revealed by the decision below is of sufficient consequence locally, nationally, and doctrinally to warrant the Court's attention. The social impact of the decision below, and the

dislocations that will follow from it, are too severe to let pass in error. A writ of certiorari should accordingly issue.

POINT II

NATIONALLY SIGNIFICANT CONFLICTS REGARDING THE MEANING AND SCOPE OF *CARBONE* EXIST AND SHOULD BE RESOLVED BY GRANT OF CERTIORARI.

Respondents do not deny that lower federal courts throughout the country have issued, and continue to issue, inconsistent decisions regarding the meaning and scope of the Court's decision in *Carbone*. Rather, they assert that the burgeoning balkanization of the law in this area furnishes no reason for this Court to exercise its review powers because, for the most part, the Circuit Courts of Appeals have managed to reach their irreconcilable conclusions without expressly disagreeing with one another. *But see SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996) (acknowledging a conflict between the Second Circuit and Eleventh Circuit over the applicability of the market participant doctrine to solid waste regulations).

Sweeping aside any consideration of the social cost of the legal disarray, respondent Atlantic Coast instead reminds the Court that "it is the duty of the courts of appeals, and not the Supreme Court, to maintain uniformity within their own circuits." (Atlantic Coast Brief at 22). In a case arising under the dormant Commerce Clause, respondents' invocation of "uniformity within a circuit" is ironic, if not oxymoronic. Inconsistent federal

court decisions are as destructive of a seamless national market as crazy-quilt state regulations – with one legally substantial difference: under our Constitution, state regulations are expected to be diverse, while federal law is *supposed* to be uniform.

Respondents may be untroubled by the spectacle of lower federal courts unpredictably upholding and striking down state solid waste programs in the name of national uniformity, but the Court should not share that indifference. If a national market for solid waste disposal is the goal, then the extent to which a State retains its police powers over that commercial activity should not, and indeed must not, vary from district to district and circuit to circuit, let alone vary wildly, as it does now. Exercise of this Court's supervisory powers is thus warranted, and is urgently needed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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